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No. USCA 82-6027

in the
Supreme Court
of the
United States

CHARLES SWEPENISER, a/k/a
CHARLIE FRIEDMAN, a/k/a
CHARLIE BROWN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. USCA 82-6027

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Supreme Court
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United States

CHARLES SWEPENISER, a/k/a
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v.

UNITED STATES OF AMERICA,

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

The petitioner, CHARLES SWEPENISER, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceeding on August 10, 1983.

QUESTIONS PRESENTED

1. Whether a three (3) year pre-indictment delay in indictment of a defendant on charge of possession of a firearm by convicted felon has prejudiced the defendant's right to fair trial contrary to the defendant's Fifth Amendment Due Process Rights so as to require dismissal of the indictment where such pre-indictment delay results in loss to the defendant of testimony of the owner of the subject firearm and the government offers no reason for such pre-indictment delay.

2. Whether the defendant upon showing of actual specific prejudice caused to the defendant by a three (3) year pre-indictment delay with no showing by the government of logical explanation for such delay must additionally show such government delay to have been intentional and to gain tactical advantage over the defendant.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the judgment of guilt appears as Appendix A of this petition.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C.
1254

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment V.

STATUTE INVOLVED

Title 18, United States Code, Appendix, Section
1202(a)(1).

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STATEMENT OF THE CASE

On June 8, 1982, the indictment was filed herein charging that Mr. Swepeniser on or about June 15, 1979, did knowingly possess a firearm in violation of Title 18, United States Code, Appendix, Section 1202(a)(1), before the United States District Court for the Southern District of Florida; case no. 82-286-CR-JWK.

On June 28, 1982, Mr. Swepeniser filed his motion to dismiss indictment with Supporting Memorandum of law asserting pre-indictment delay to have violated his due process rights under Amendment V. to the United States Constitution and his Fourth Amendment Rights to Speedy Trial.

On July 6, 1982, the United States Magistrate filed his report of United States Magistrate wherein the Magistrate found the motion to "not establish the prima facie case required by Local Rule 10.H.2" as asserted by Mr. Swepeniser "that he has been denied due process by a three year delay" in "the return of the indictment".

On July 26 and 27, 1982, Mr. Swepeniser was first tried before the Honorable John F. Gerry, the jury was unable to reach a verdict and a mistrial was declared.

On August 26th, trial was conducted before the Honorable Charles H. Haden II, United States District Judge. The jury returned a verdict of guilty as charged in the indictment.

On September 7, 1982, Mr. Swepeniser filed his motion for new trial.

On April 8, 1983, the Honorable Charles H. Haden II entered his memorandum opinion and order denying same. On August 11 the Eleventh Circuit Court of Appeals affirmed Mr. Swepeniser's judgment of guilt.

A. FACTS RELATING TO THE OFFENSE

On June 13, 1979, Special Agents Donald Friel and William Herbert of the Bureau of Alcohol, Tobacco, and Firearms arrived in Miami from Philadelphia to serve a witness subpoena on a person named Charles Friedman and went to Mr. Swepeniser's address in Miami, 1247 Northeast 119th Street and did not find Charles Friedman a/k/a Charles Swepeniser on that day. (Vol. #4, p.41)¹ On June 14, 1979, Special Agents Friel and Herbert went to the area of the Swepeniser home "and set up surveillance outside looking for Mr. Friedman to come in or out" and saw no occupant of the Swepeniser residence. (Vol. #4, pg. 41-42)

Tiffany Swepeniser, daughter of Charles Swepeniser, testified that she, her brother, and father, Charles Swepeniser went to Disney World on June 11, 1979 and returned home on June 14, 1979. (Vol. #4, pg. 159-160) Tiffany Swepeniser testified that on June 14, 1979, after they had returned from Disney World that "two men" came to the Swepeniser home "and they asked for Charlie, and I said Charlie wasn't here". (Vol. #4, pg. 160) Tiffany Swepeniser testified that "the next day, in the morning, they came to the door, and I went to answer the door. They said is your father here and I said yes, and I said here, wait a minute, I will go get

¹The designation (Vol. # , p.) refers to the Record Volume and page number on Appeal below.

him. I went in the bedroom, and I woke up my father, walked out to the living room, and they were standing in the living room". (Vol. #4, pg. 161) Tiffany Swepeniser identified Agents Friel and Herbert as the two men who came to her home on June 14th and 15th, 1979. (Vol. #4, pg. 161)

Agent Friel testified that on June 15, 1979, he and Special Agent Herbert knocked on the Swepeniser front door at about 8:00 A.M., that Mr. Friedman's mother answered the door, and that they remained on the Swepeniser front porch until Mr. Swepeniser arrived in his pajamas and invited them into the Swepeniser home. Agent Friel testified that he identified himself and Agent Herbert as United States Treasury Agents from the Bureau of Alcohol, Tobacco and Firearms whereupon Mr. Swepeniser invited them into his home. Agent Friel testified that Tiffany Swepeniser was not present and that the defendant's wife, Judy Swepeniser, was not present at the time of the Agents' entry into the Swepeniser home. (Vol. #4) Agent Friel testified that he presented the subpoena to Mr. Swepeniser in the living room of the Swepeniser home. (Vol. #4, pg. 43-45)

Mrs. Elizabeth Swepeniser, mother of Charles Swepeniser, testified that two men came to the door of the Swepeniser home on June 14, 1979, and "said they was friends of my son's from Pennsylvania", that they did not show their badges, and that the same two men returned the next morning, June 15, 1979. (Vol. #4, pg. 148-149) Mrs. Elizabeth Swepeniser testified that the same two men who came to her son's door on the morning of June 15, 1979, did not display their badges,

and that "they came to the door, and my granddaughter let them in, and they came on in the house". (Vol. #4, pg. 149-150) Mrs. Swepeniser testified that Tiffany Swepeniser is a minor. (Vol. #4, pg. 151) Mrs. Elizabeth Swepeniser testified that on the evening of June 14, 1979, Terry Swepeniser, the minor son of Charles Swepeniser slept in his father's bedroom, that Terry Swepeniser was feeling ill, that the blinds and shades in the bedroom were down and the room dark, and that Charles Swepeniser returned home from errands after returning from the trip to Disney World at 10:00 P.M., took a shower and went to bed in the darkened room. (Vol. #4, pg. 152-153) Mrs. Elizabeth Swepeniser testified that on June 14, 1979, Judy Swepeniser, wife of Charles Swepeniser, brought her to the Swepeniser home around 12:00 to watch the children while Charles Swepeniser did his errands after the Disney World trip. he further testified that Judy Swepeniser did not advise of the gun Judy had kept in her bedroom during Mr. Swepeniser's absence at Disney World. (Vol. #4, pg. 154-155)

Judy Swepeniser testified that she lived at 1245 Northeast 119th Street, Biscayne Park with her husband, Charles and two children, Tiffany and Terry in June of 1979. (Vol. #4, pg. 106-107) Mrs. Judy Swepeniser testified that she was home until noon on June 14, 1979, and thereafter left for Boca Raton. (Vol. #4, pg. 107) Mrs. Swepeniser further testified that she had been home alone and sick from June 10, 1979 through June 14, 1979. (Vol. #4, pg. 108-109) Mrs. Judy Swepeniser further testified that Charlie Swepeniser was away with their two children at Disney World during this period from June 10-June 14, 1979. (Vol. #4, pg. 108) Mrs. Judy

Swepeniser testified that after her husband left "two friends" came over who she had known in Israel from her experiences as a former Miss Israel. (Vol. #4, pg. 108) She testified that she is an Israeli citizen. (Vol. #4, pg. 110-111) Mrs. Swepeniser testified that these two friends were Erik Okhok and Yosi Cohen. (Vol. #4, pg. 108-109) Mrs. Swepeniser testified that she asked Erik and Yosi if either of them had a gun because she was afraid to be alone in the house in her husband's absence. (Vol. #4, pg. 109) Mrs. Swepeniser testified that Yosi gave her a .38 Super Colt for her personal protection on June 11, 1979, which she recognized from her prior experience as a Sergeant in the Israeli Army. (Vol. #4, pg. 109-110, 129) Mrs. Swepeniser testified that Charlie and the children came back on June 14th "about noon", that she stayed "about an hour", and thereafter left for Boca Raton. (Vol. #4, pg. 110, 118, 119) Mrs. Swepeniser testified that she had placed the .38 Colt above her bed on a bookshelf within easy reach and upon her husband's return from Disney World, did not advise him of the gun's presence in their home. (Vol. #4, pg. 118, 121, 130-131, 135-136) Mrs. Swepeniser testified that she had previously been raped; (Vol. #4, pg. 119) that she had been the subject of obscene phone calls; (Vol. #4, pg. 120) and that she was "very scared to be alone". (Vol. #4, pg. 120) Mrs. Swepeniser testified that she was accustomed to keeping "guns every time" Mr. Swepeniser "used to work out of town" and that she would customarily in her husband's absence "borrow a gun from somebody". (Vol. #4, pg. 132) Mrs. Judy Swepeniser testified that on June 14, 1979, upon her husband's return from Disney World, she did *not* advise Charlie Swepeniser of the gun's presence in their home. (Vol. #4, pg. 132, 135-136) Mrs. Swepeniser testified that she talked with Yosi Cohen a few months after

agents Friel and Herbert seized the firearm from her bedroom and that she had offered to pay for it. (Vol. #4, pg. 133) Mrs. Judy Swepeniser was asked as to the absence of Yosi Cohen at trial and repounded as follows:

Mr. Stone: Where is Mr. Cohen?. Why didn't they call him as a witness? I want to ask her where he is.

Q: (By Mr. Stone) Where is Yosi Cohen?

A: He is in the Israeli Army.

Q: Israeli Army?

A: Yes.

Q: Did you make an effort to try to get him here today? Was it possible to try to get him?

A: I couldn't get him. You can get nobody who is in the Army right now in Israel. It is impossible.

Q: There is a little disagreement over there right now; isn't there?

Mr. Gold: Objection, Your Honor.

The Court: Sustained. (Vol. #4, pg. 134-135)

Erik Okhok testified that he is an Israeli citizen; (Vol. #4, pg. 136) that he first knew Mrs. Judy Swepeniser by her maiden name Judy Perry when she was Miss Israel; (Vol. #4, pg. 138) and that he went with his Israeli friend, Yosi Cohen to visit Judy on "the 9th or 10th or 11th" of June, 1979, when her husband was out of town. (Vol. #4, pg. 139-140) Mr. Okhok testified that Mrs. Swepeniser asked for a gun because she was alone and afraid and that Yosi Cohen provided her with a firearm for her protection. (Vol. #4, pg. 140) Mr. Okhok testified that he observed Mrs. Swepeniser take the gun Yosi gave her into the bedroom and return. (Vol. #4, pg. 141) Mr. Okhok testified that Charlie Swepeniser and the children, Terry and Tiffany were not at home when he and Yosi gave Judy the firearm. (Vol. #4, pg. 141).

Agents Friel and Herbert testified that in the morning hours of June 15, 1979, after serving the witness subpoena upon Mr. Swepeniser, that they requested a place to talk with him in private and that Mr. Swepeniser led them to the bedroom where the firearm was discovered. (Vol. #4, pg. 46-47) Agent Friel testified that there was a small boy sleeping on the bed in the bedroom and that they observed a .38 Super Colt on the bookcase above his head. (Vol. #4, pg. 47-48) Agents Friel and Herbert testified that Mr. Swepeniser was read his rights as per Miranda, whereupon as they testified Mr. Swepeniser freely stated that he was a convicted felon and that the gun was his. (Vol. #4, pg. 49, 51-52, 54, 90-91) Agent Friel testified that Mr. Swepeniser advised him that his son, sleeping on the bed was ill. (Vol. #4, pg. 69-70)

No fingerprint latents were ever obtained from the subject firearm.

Agent Friel testified at the second trial that two hours after he and Agent Herbert left the Swepeniser home, he received a telephone call from Mr. Swepeniser wherein Mr. Swepeniser requested return of the subject firearm. (Vol. #4, pg. 57-58) Agent Friel testified that he was in the process of completing his report of the subject incident when he received the phone call and that he did not tape record the alleged conversation nor make any reference to Mr. Swepeniser's alleged telephone call in his report. (Vol. #4, pg. 76-77) Agent Friel did not on direct examination offer any testimony as to this telephone call at the first trial herein on July 26th and July 27th, 1982, wherein the jury was unable to reach a unanimous verdict and a mistrial was declared. (R-249, 268)

REASONS FOR GRANTING THE WRIT

This case raises a fundamental constitutional issue that has never been directly resolved by this Court, namely, in instances of pre-indictment delay where the defendant shows actual specific prejudice caused by pre-indictment delay and there is absence of government reason for such delay whether the defendant must additionally show such government delay to have been intentional and to gain tactical advantage over the defendant. While this issue has not been definitively resolved, in the petitioner's view the decision of the

Court below clearly is in disharmony with decisions of United States Court of Appeals for Ninth, and Seventh Circuits. (*United States v. Mays*, 549 F.2d 670, 676-678, (9th Cir. 1977); *United States v. King*, 593 F.2d 269, 272 (7th Cir. 1979) and conflicts with the pronouncements of this Court in *United States v. Marion*, 404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 455 (1971) and *United States v. Lovasco*, 431 U.S. 783, 52 L.Ed.2d 7, 97 S.Ct. 2044 (1977).

ARGUMENT

We submit errors of the Eleventh Circuit Court of Appeals are twofold. We submit that the record will reflect there to have been specific actual substantial prejudice occasioned upon the petitioner in the loss of testimony of witness Yosi Cohen and that the loss of testimony of Yosi Cohen was occasioned by a three (3) year pre-indictment delay. We submit that upon such showing the burden of proof should have shifted to the government to show justifiable reason for its delay, which reasons it did not offer or present. We submit the Court of Appeals for the Eleventh Circuit to have erred in requiring the petitioner to present evidence "that the delay was a deliberate tactical maneuver by the government". Because access to evidence of such intent would be difficult to obtain as it would be largely in the government's possession, the petitioner should not be required to show intentional misconduct on the part of the government before protections afforded by the Due Process Clause Apply.

In the case sub judice, there was testimony of record that Yosi Cohen, the individual who purportedly

provided the subject firearm to Judy Swepeniser after three years delay was unavailable at trial to testify that he provided the subject firearm to Mrs. Swepeniser. Mr. Cohen was unavailable at trial to offer testimony that Charles Swepeniser and the children were not home at the time he, with Erik Okok provided the gun to Judy Swepeniser. Mr. Cohen was unavailable at trial to offer testimony that the subject firearm was his and not Charles Swepeniser's. Mr. Cohen was unavailable at trial to offer testimony as to Judy Swepeniser's offer of repayment for the seized gun two months after Agents Friel and Herbert seized it in 1979. Mr. Cohen was unavailable to offer testimony that would corroborate and substantiate the assertions of Charles Swepeniser that he did not at any time have actual possession of the firearm nor knowledge that the firearm which Judy obtained had been placed in the Swepeniser home during Charlie's absence with the children at Disney World. The testimony of Yosi Cohen would have cast doubt upon the credibility of Agents Friel and Herbert's testimony both as to Mr. Swepeniser's purported admissions in his home which were not recorded and as to the purported phone call to Friel two hours after the seizure of the firearm which telephone conversation was not electronically recorded nor even mentioned in the written report Friel was filling out at time the alleged phone call was received. That the testimony of Mr. Cohen may well have resulted in a different outcome at trial is apparent. Consider the July 26, 27th mistrial where the jury could not reach a unanimous verdict.

The United States Court of Appeals for the Eleventh Circuit rejected the Petitioner's assertions of due process

deprivation occasioned by the three (3) year preindictment delay of Petitioner on authority of *United States v. Mills*, 704 F.2d 1553 (11th Cir. 1983); *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983); and *United States v. Radue*, 707 F.2d 493 (11th Cir. 1983). These authorities were cited for the proposition that the prejudice occasioned upon Petitioner by the three (3) year pre-indictment delay in loss of witness Yosi Cohen was not substantial prejudice and for the proposition that Petitioner bore the burden of proof to show that the Government intentionally prolonged the return of the Indictment to gain tactical advantage. The Court of Appeals below held that the Petitioner failed to meet his burden of proving the government pre-indictment delay to have been intentional and for the purpose of gaining tactical advantage over Petitioner. The Court of Appeals upon such reasoning held that Petitioner had not adequately proven the deprivation of his due process rights to fair trial assured under the Fifth Amendment to the United States Constitution.

Petitioner submits that where a Defendant has established actual substantial prejudice due to government caused pre-indictment delay, as is evinced herein in Petitioner's loss of the testimony of Yosi Cohen, that the government properly should be required to provide the Court with its reason for the delay. *United States v. Marion*, 404 U.S. 307, 324, 325, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971). Petitioner submits that this Court in its *Marion* decision *supra*, did not set forth the absolute requirement that specific bad intent on the part of government be shown by the Defendant before a Defendant's right to due process of law attaches. *United States v. Marion*, 404 U.S. 307, 324-325, 92 S.Ct.

455, 465, 30 L.Ed.2d 468 (1971). As this Court held at page 325 of its *Marion* decision *supra*: "To accommodate the sound administration of justice to the rights of the Defendant to a fair trial, it will necessarily involve a delicate judgment based on the circumstances of each case". We respectfully submit further that where as herein the Defendant is unable to properly defend himself because pre-indictment delay has deprived him of an essential witness, that the Defendant's due process rights have been jeopardized. It becomes incumbent upon the government in such instance to affirmatively provide adequate reason for such delay. Moreover, we submit that the protections of the Due Process Clause attach whether government delay is intentional or merely negligent. *Barker v. Wingo*, 407 U.S. 514, 531, 92 S.Ct. 2182, 33 Ed.2d.101(1972); *United States v. Mays*, 549 F.2d 670, 676-678 (9th Cir. 1977); *United States v. King*, 593 F.2d 269 (7th Cir. 1979); *United States v. Richburg*, 478 F.Supp 535 (M.D. Tenn.1979); *United States v. Stewart*, 426 F.Supp 58, 60 (E.D. Mich. 1976); *United States v. Brand*, 556 F.2d 1312, 1317 n.7 (5th Cir. 1977), cert. denied, 434 U.S. 1063, 98 S.Ct. 1237, 55 L.Ed.2d 763(1978).

We respectfully note to this Court the balancing analysis it employed in *United States v. Lovasco*, 431 U.S. 783, 52 L.Ed.2d 752, 97 S.Ct. 2044(1977), rejected by the Eleventh Circuit Court of Appeals below.

In *United States v. Lovasco*, *supra*, this Court applied a balancing of the reasons presented by the government for pre-indictment delay against Mr. Lovasco's claim of prejudice in loss of witnesses resulting from such delay. This Court found the government representations of on-going criminal investigation to excuse the lapse of time in return of the Indictment.

We note herein, unlike the *Lovasco* case *supra*, that there is no testimony of record evincing any government investigation after date of seizure of the subject firearm from the Swepeniser home on June 15, 1979, as would excuse three (3) year pre-indictment delay. Moreover, Agents Friel and Herbert testified that they played no further role in any investigation of this matter after seizure of the subject firearm. There is not of record presented by the government any reason for the subject three (3) year pre-indictment delay. Moreover, the loss of testimony of Yosi Cohen (the owner of the subject firearm) to Petitioner from such delay cannot be summarily cast aside as "speculative", "cumulative", or as something other than the "unique exculpatory" testimony it would have on its face been. The absence of government explanation for the subject three year pre-indictment delay balanced against the specific actual prejudice to the presentation of Petitioner's defense shown in denial to Petitioner of Yosi Cohen's testimony clearly under that balancing standard set forth by this Court in its *Marion* and *Lovasco* decisions *supra*, mandate the finding of denial of Petitioner's right to due process of law assured under Amendment V, United States Constitution. Such compels reversal of the conviction obtained below.

CONCLUSION

For these reasons the Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

/s/ Robert C. Stone

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit has been furnished by MAIL DELIVERY to Special U.S. Attorney, I. RANDALL GOLD, U.S. Attorney's Office, Strike Force, 77 Southeast Fifth Street, Miami, Florida 33125, and Assistant U.S. Attorney, WILLIAM C. BRYSON, P.O. Box 14263, Ben Franklin Station, Washington, D.C. 20044, this 30th day of DECEMBER, 1983.

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APPENDIX

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Appeal from the United States District Court for the Southern District of Florida dated August 10, 1983 Per Curiam decision	A-2

[FILED SEP 1 1983]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-6027
Non-Argument Calendar

D.C. Docket No. 82-286-CR-JWK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES SWEPENISER, a/k/a
CHARLIE FRIEDMAN, a/k/a CHARLIE BROWN,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

Before HILL, JOHNSON and HENDERSON, Circuit
Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

August 10, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-6027
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES SWEPENISER, a/k/a
CHARLIE FRIEDMAN, a/k/a CHARLIE BROWN,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 10, 1983)

Before HILL, JOHNSON and HENDERSON, Circuit
Judges.

PER CURIAM:

Charles Swepeniser a/k/a Charlie Friedman a/k/a Charlie Brown appeals his conviction in the United States District Court for the Southern District of Florida for a violation of 18 U.S.C. §1201(a)(1) (1976), possession of a firearm by a convicted felon. We affirm.

On June 15, 1979, agents from the Bureau of Alcohol, Tobacco and Firearms went to Swepeniser's home in

Miami, Florida to serve a subpoena on him in connection with another matter. Swepeniser led the agents to his bedroom so that they could discuss business without disturbing his elderly mother. One of the officers observed a .38 caliber semi-automatic Colt pistol in plain view on the bookcase-style headboard of Swepeniser's bed. The weapon was immediately seized and the appellant was advised of his rights. Swepeniser stated in response to questions that the gun belonged to him and that he knew that it was unlawful for him, as a convicted felon, to possess a firearm. Later, he changed his story, asserting that he had simply borrowed the gun from a friend.

Three years later, Swepeniser was indicted for knowingly possessing a firearm in violation of 18 U.S.C. §1202(a)(1) (1976). He moved to dismiss the indictment on the grounds that the delay violated his fifth amendment due process rights and his sixth amendment right to a speedy trial. The motion was referred to a magistrate pursuant to 28 U.S.C. §636(b)(1)(B) (1976) for preliminary consideration and issuance of a report and recommendation. The magistrate found that Swepeniser's allegations were merely conclusory and, hence, insufficient to justify dismissal of the indictment. Record, Vol. 1 at 89. The district court failed to adopt or reject the magistrate's report and recommendation. Instead, the case proceeded to trial. Following a mistrial, Swepeniser was retried and convicted by a jury. He filed a motion for a new trial, which was denied by the district court.

In this appeal, Swepeniser's sole contention is that the government's pre-indictment delay deprived him of his right to due process of law as guaranteed by the fifth amendment of the United States Constitution. To prove a constitutional deprivation based on the three-

year delay between detection of his crime and his indictment, Swepeniser must demonstrate that (1) he suffered substantial prejudice as a result of the delay and (2) the government intentionally prolonged the return of the indictment in order to gain a tactical advantage. *United States v. Radue*, No. 82-7124, slip op. at 3454 (11th Cir. June 16, 1983); *United States v. Lindstrom*, 698 F.2d 1154, 1157-58 (11th Cir. 1983). In his original motion and supporting memorandum, Swepeniser broadly asserted that the delay was unnecessary, that the facts were stale, that he was unable to gain access to evidence or defense witnesses and that the Government provided no logical explanation for the time lag. Record, Vol. 1 at 33-34. He did not, however, point to any specific evidence that was lost to him as a result of the delay, nor did he mention any actual prejudice to his defense. "Speculative allegations, such as general allegation of loss of witnesses and failure of memories, are insufficient to demonstrate the actual prejudice required by [*United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)]." *Radue*, slip op. at 3454-55, quoting *United States v. Butts*, 524 F.2d 975, 977 (5th Cir. 1975).

On appeal, Swepeniser asserts for the first time that he was prejudiced by the unavailability of a certain witness, Yosi Cohen. He claims that Cohen would have admitted ownership of the gun and would have testified that he loaned it to Swepeniser's wife. Cohen was unavailable as a witness because he was serving in the Israeli army at the time of the trial. Even if he had been present to testify to these facts, his account would have been merely in addition to other evidence. Indeed, Swepeniser's wife testified at the trial that she had obtained the gun from two Israeli friends, Erik Okhok

and Yosi Cohen, who visited her while her husband was out of town. She stated that she was afraid to be alone and often borrowed a gun to protect herself at home. Okhok was a witness at Swepeniser's trial. He corroborated the wife's testimony and stated that the weapon belonged to their mutual friend, Cohen. Swepeniser also maintains that Cohen could have testified that Mrs. Swepeniser offered to pay him for the gun two months after the June, 1979 incident. Since Mrs. Swepeniser told the jury of her offer, any testimony by Cohen on the same point would likewise have been cumulative. In failing to show that Cohen could have offered new or unique exculpatory information, Swepeniser has not demonstrated that he suffered actual, substantial prejudice.

Nor has the appellant satisfied the second prong of the test. He has presented no evidence "that the delay was a deliberate tactical maneuver by the government." *United States v. Mills*, 704 F.2d 1553, 1557 (11th Cir. 1983). Swepeniser simply assumes that he has proven actual prejudice and claims that, therefore, the burden shifted to the government to justify the three-year delay. The rule in this circuit is clearly to the contrary. The burden is on the appellant to make the twofold showing of actual prejudice and deliberate delay. *Id.* Having failed to meet his burden of proof, Swepeniser's bare allegation of a due process deprivation lacks merit.

Accordingly, the judgment of the district court is **AFFIRMED.**

JAN 24 1984

ALEXANDER L. STEVAS.
CLERK

No. 83-1083

in the
Supreme Court
of the
United States

CHARLES SWEPENISER, a/k/a
CHARLIE FRIEDMAN, a/k/a
CHARLIE BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

ROBERT C. STONE
ROBERT C. STONE, P.A.
Fourth Floor
Center Court Building
2450 Hollywood Boulevard
Hollywood, Florida 33020

SUPPLEMENTAL APPENDIX

Report of United States Magistrate App. 1

Memorandum Opinion and Order App. 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-286-Cr-JWK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES SWEPENISER
AKA: CHARLES FRIEDMAN
AKA: CHARLIE BROWN,
Defendant.

REPORT OF
UNITED STATES MAGISTRATE

The defendant Charles Swepeniser has filed a motion to dismiss the Indictment. The motion has been referred to the undersigned for preliminary consideration and report, pursuant to 28 U.S.C. §636 (b)(1)(B).

The Indictment in this case generally tracks the statutory language and contains all of the essential elements of the offenses charged in each count. *United States v. Cantu*, 557 F.2d 1173 (5 Cir. 1977); *United States v. McPhatter*, 473 F.2d 1356 (5 Cir. 1973).

Further, each count adequately informs the defendant of the offense he is charged with. *United States v. Carvin*, 555 F.2d 1303 (5 Cir. 1977); *United States v. Constant*, 501 F.2d 1284 (5 Cir. 1974).

The defendant also asserts that he has been denied due process by a three year delay between the alleged bank robbery and the return of the Indictment.

The sole Constitutional limit upon pre-accusation delay in prosecution of a criminal charge is the Fifth Amendment Due Process Clause. The Sixth Amendment guarantee of speedy trial has no application to the pre-accusation delay. *United States v. Lovaseo*, 431 U.S. 738 (1977); *United States v. Marion*, 404 U.S. 307 (1971).

To prevail upon such a Fifth Amendment claim, the defendant must allege and prove substantial actual prejudice and intentional tactical delay by the government. *United States v. Avalos*, 541 F.2d 1100 (5 Cir. 1976).

The motion and supporting memorandum assert only that the facts in this case are "stale" and that the alleged "delay" could serve no other purpose than to secure an unfair advantage over the defendant, who, for no specified reason "today is not able to gain access to evidence or witnesses to defend his case."

Such conclusory and speculative allegations can form no basis for the relief sought. This motion does not establish the prima facie case required by Local Rule 10.H.2., and it is therefore the recommendation of

the Magistrate that it be denied, without evidentiary hearing.

Dated: July 5, 1982

/s/ Claudine H. Sorentino

UNITED STATES MAGISTRATE

cc: Alexander L. Martone, Esq.
United States Attorney

[RECEIVED APR 15 1983]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-286-CR-JWK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES SWEPENISER,
Defendant.

MEMORANDUM OPINION AND ORDER

In August, 1982, the Court conducted a jury trial in the above styled criminal action, at the close of which the jury found the Defendant guilty of violating 18 U.S.C. Appx. I, §1202(a)(1).¹ Currently pending before

¹The within indictment charges that the Defendant was convicted in 1962 by the United States District Court for the Southern District of Florida of the offense of bank robbery, which offense was and is a felony under the laws of the United States of America, and that he thereafter on or about June 15, 1979, did knowingly possess a firearm which had previously traveled in interstate commerce, in violation of 18 U.S.C. Appx. I, §1202(a)(1), which provides:

"Any person who has been convicted by a Court of the United States or of a state or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this act, any firearm [shall be guilty of an offense against the United States.]"

the Court is the Defendant's timely motion for a new trial, filed September 7, 1982. After having thoroughly considered the aforementioned motion, as well as the Government's response thereto, the Court hereby denies the Defendant's motion for the reasons set out below.

On June 15, 1979, Agents Friel and Herbert came to the Defendant's residence and asked to speak with the Defendant privately. Whereupon the Defendant escorted the agents into his bedroom where they observed a pistol on a shelf at the head of the bed. Friel and Herbert testified that the Defendant, after having been advised of his *Miranda* rights told them that he was a convicted felon, and that the bedroom and house which they were in, as well as the pistol, belonged to him. The Defendant's wife, however, testified that she obtained the pistol on June 10, 1979, so as to be able to protect herself while her husband was away with their children on a four-day trip to Disneyworld. Mrs. Swepeniser testified that she placed the pistol on a shelf above the bed and that she did not inform her husband of the presence of the firearm upon his return from Disneyworld at about noon on June 14, 1979. The Defendant's mother testified that the Defendant left the house shortly after his return from Disneyworld and that he did not return until approximately 10:00 p.m. that evening, at which time he went to bed in the darkened bedroom where his sick son was already asleep.²

²The Defendant's mother testified that the Defendant's son was not feeling well on June 14 after his return from Disneyworld, and that he went to sleep in his father's bed. Agents Friel and Herbert testified that the boy remained asleep in the bedroom on June 15 while they were speaking with the Defendant, who informed them that the boy had not been feeling well.

Upon leaving the Defendant's house on June 15, 1979, Friel and Herbert seized the firearm. Friel further testified that the Defendant called him approximately two hours later and requested the return of the firearm.

I. Sufficiency of the Evidence

When viewing the evidence and all reasonable inferences derived therefrom in a light most favorable to the Government, the Defendant's contention that the jury could not have found the evidence to be inconsistent with every reasonable hypothesis of innocence is without merit.³ In particular the Defendant's argument that the Government failed to prove beyond a reasonable doubt that he, rather than his wife, possessed the pistol is easily disposed of by the Fifth Circuit's holding in *U.S. v. Smith*, wherein the court stated:

"Like any other fact in issue, possession may be proved by circumstantial as well as direct evidence. The law also recognizes that possession may be either actual or constructive. The defendant had constructive possession if he had the intent and the power to exercise dominion and control over the weapons as charged. . . . 'In order to establish constructive possession, the Government must produce evidence showing ownership, dominion, or control over the contraband itself or the premises or vehicle in which contraband is concealed.' . . . Smith's dominion and control over his

³*Glasser v. U.S.*, 315 U.S. 60, rehearing denied 315 U.S. 827 (1942); *U.S. v. Tolliver*, 665 F.2d 1005 (11th Cir. 1982); *U.S. v. Spradlen*, 662 F.2d 724 (11th Cir. 1981).

own residence, in which the guns were found, is a sufficient basis for the jury's inference of constructive possession. The guns were either in plain view or in places where they could hardly have escaped his knowledge. Smith claims, however, that the Government has not disproved his contention that the guns were in the possession of his wife. In *U.S. v Ransom*, 515 F.2d 885 (5th Cir.) *cert. denied* 424 U.S. 944 (1976), this court approved a charge containing the following statement: 'The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.' "

591 F.2d 1105, 1107 (5th Cir. 1979).

In the case at bar, as in *Smith*, the Defendant's dominion and control over his bedroom, where the pistol was found in plain view, provided the jury with a sufficient basis to infer that the Defendant had constructive possession of the firearm, either sole or joint, on June 15, 1979. *Accord, U.S. v Stanley*, 597 F.2d 866 (4th Cir. 1979); *U.S. v Scarborough*, 539 F.2d 331 (4th Cir. 1976), *affirmed* 431 U.S. 563 (1977); *U.S. v Burnette*, 524 F.2d 29 (5th Cir. 1975) *cert. denied* 425 U.S. 939 (1976).

Similarly, the Defendant's admission that the pistol belonged to him was properly before the jury, inasmuch as the evidence of the Defendant's constructive possession

of the firearm, as discussed above, sufficiently bolstered the Defendant's admission so as to justify the jury's inference that the Defendant's admission was true. See *Smith v. U.S.*, 348 U.S. 147 (1954); *Opper v. U.S.*, 348 U.S. 84 (1954); *U.S. v. Micieli*, 594 F.2d 102 (5th Cir. 1979); *U.S. v. Evans*, 572 F.2d 455 (5th Cir.) cert. denied 439 U.S. 870 (1978).

II. The Court Did Not Err in its Evidentiary Rulings

The Defendant maintains that the Court improperly excluded reference to the Defendant's son's surgery some two weeks after the incidents of June 15, 1979, contending that such testimony was admissible under *Rule 401*, Federal Rules of Evidence, in that it tended to prove that the boy was in poor health and required rest upon his return from Disneyworld on June 14, 1979. The Defendant argues that this was a fact "of consequence," since it explained the darkness in the Defendant's bedroom where the boy was resting, which in turn, according to the Defendant's theory of the case, explained his ignorance of the fact that the pistol was in the room. Assuming the relevance of this evidence, the Court properly excluded it under *Rule 403*, Federal Rules of Evidence, since its probative value was outweighed by the danger of unfair prejudice to the Government, and where in any event, it was merely cumulative. Cf., *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980) ("[evidence] is unfairly prejudicial if it 'appeals to the jury's sympathies . . .'").

The Court further finds that it properly excluded reference to the fact that the Defendant was not arrested until three years after the seizure of the pistol, inasmuch

as this discrete fact was totally irrelevant to the jury's determination of the guilt or innocence of the Defendant. *See Rules 401 and 402, Federal Rules of Evidence.*

Finally, the Defendant's contention that the Court erred in admitting Agent Friel's testimony that the Defendant telephoned him some two hours after he and Herbert seized the firearm on June 15, 1979, is without merit, inasmuch as this evidence was admissible to show the Defendant's knowledge of the gun and his intent to possess it. *See Rule 404(b), Federal Rules of Evidence.*

Accordingly, the Court hereby DENIES the Defendant's motion for a new trial.

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

ENTER: 4/8/83

/s/ Charles H. Haden II
United States District Judge